

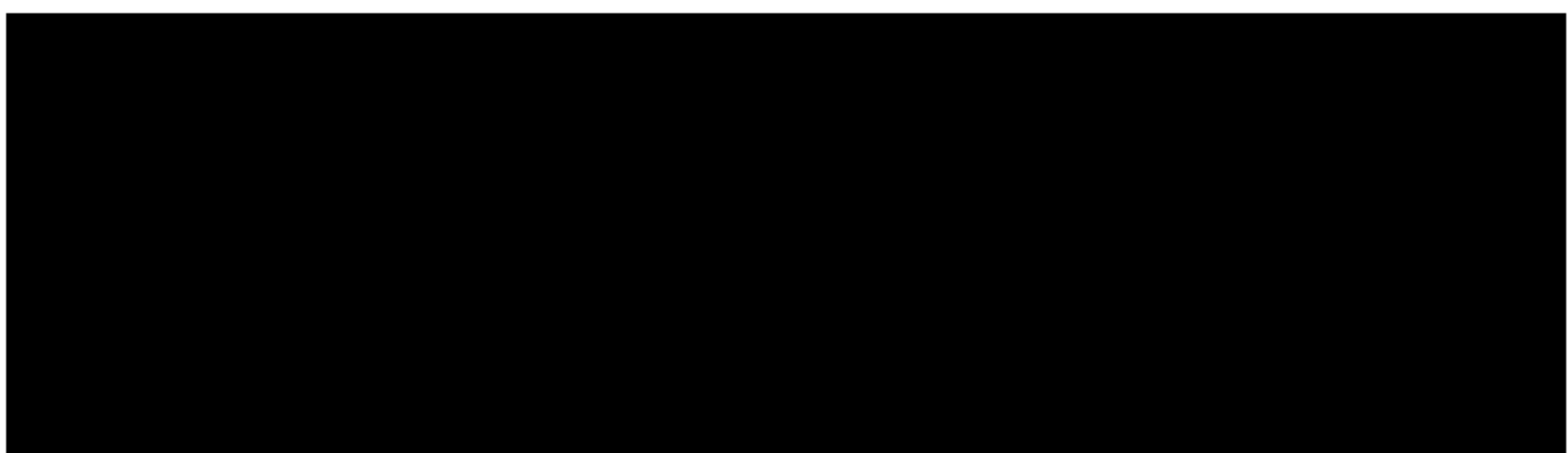
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



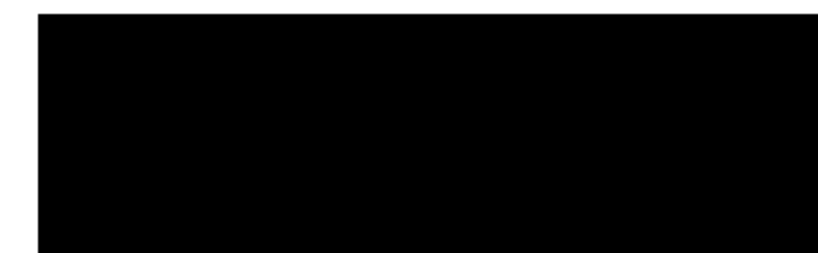
U.S. Citizenship
and Immigration
Services

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DATE: **OCT 13 2011** OFFICE: TEXAS SERVICE CENTER

FILE:



IN RE:

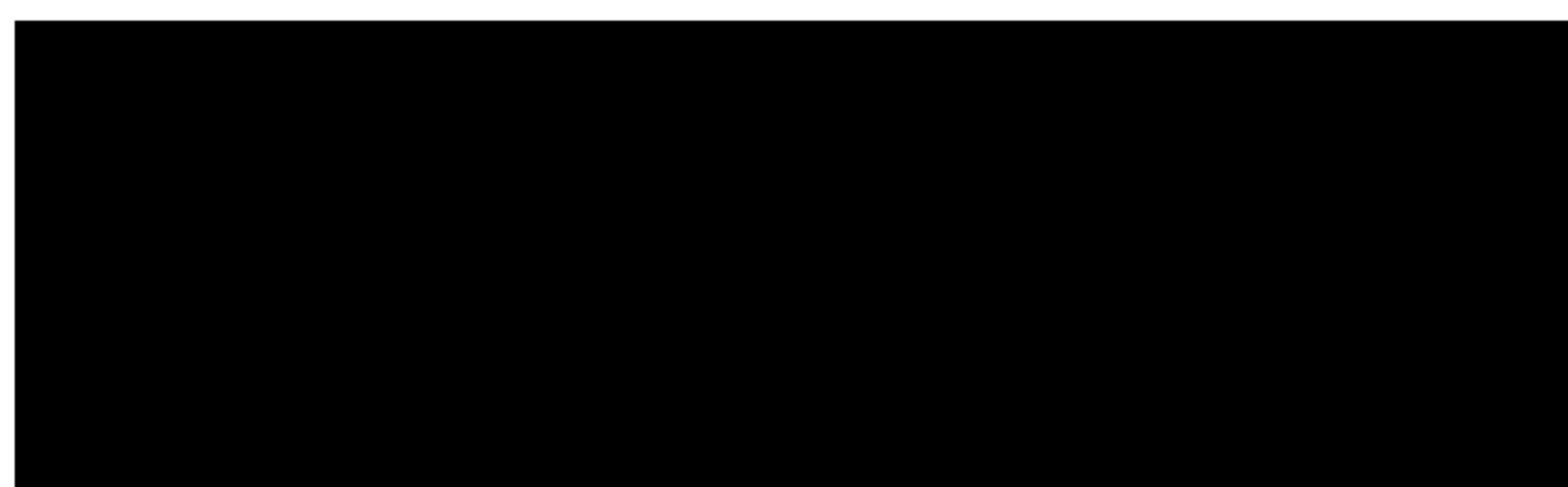
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

The petitioner is a dental care company. It seeks to employ the beneficiary permanently in the United States as a management analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, which the U.S. Department of Labor (DOL) approved, accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not meet the specified job requirements or qualify for the classification sought. Specifically, the director determined that the beneficiary did not possess the requisite education and experience.

On appeal, counsel submits a letter, a copy of a prior AAO decision involving the same beneficiary that concluded that the beneficiary's education alone is equivalent to a U.S. bachelor's degree, and additional evidence. The AAO will reverse the director's decision. The AAO will conclude that the beneficiary possesses the equivalent to a U.S. baccalaureate followed by over five years of progressive experience in the specialty. However, the AAO will also conclude that the petitioner has failed to demonstrate its ability to pay the beneficiary the proffered wage of [REDACTED] from the priority date of April 23, 2008 onwards based upon certain inconsistencies in the record regarding the ownership of the petitioner's business and other affiliated companies and the multiple other beneficiaries for whom the petitioner has filed petitions.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a U.S. academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a U.S. doctorate or a foreign equivalent degree." *Id.*

The beneficiary earned a foreign three-year Bachelor of Business Administration from Gujarat University in India in 1999 and a two-year Master of Business Administration (MBA) from the same university in 2001. Thus, the issues are whether those credentials qualify the beneficiary for the classification sought and meet the specified job requirements.

Eligibility for the Classification Sought

As noted above, DOL certified the ETA Form 9089 in this matter. DOL determines whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries Congress assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. Rather, U.S. Citizenship and Immigration Services (USCIS) determines whether the alien is qualified under the alien employment certification requirements. *Matter of Wing's Tea House*, 16 I&N Dec. 160 (Acting Reg'l Comm'r 1977). Federal courts have recognized this division of authority. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

A U.S. baccalaureate degree generally requires four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

Visas shall next be made available . . . to qualified immigrants who are members of the professions

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that “[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor’s degree with at least five years progressive experience in the professions.” H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien “must have a bachelor’s degree” when considering equivalency for second preference immigrant visas. The AAO must assume that Congress was aware of the agency’s previous treatment of a “bachelor’s degree” under the Act when the new classification was enacted and did not intend to alter the agency’s interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). In fact, the Senate Conference Report for the Act presumes that a baccalaureate is a “4-year course of undergraduate study.” S. Rep. No. 101-55 at 20 (1989). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor’s degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 appeared in the Federal Register, the Immigration and Naturalization Service (the Service) (now USCIS), responded to criticism that the regulation

required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus the requisite five years of progressive experience in the specialty). More specifically, USCIS will not consider a three-year bachelor's degree as a "foreign equivalent degree" to a U.S. baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."¹ In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a U.S. baccalaureate degree (plus the requisite five years of progressive experience in the specialty). 8 C.F.R. § 204.5(k)(2).

The AAO has consulted the Electronic Database for Global Education (EDGE) as a tool to help analyze the beneficiary's educational background. According to its website, the American Association of Collegiate Registrars and Admissions Officers (AACRAO), which created EDGE is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." See <http://www.aacrao.org/About-AACRAO.aspx> (accessed September 12, 2011 and incorporated into the record of proceeding). Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment

¹ Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

management, administrative information technology and student services.” *Id.* In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D. Minn. March 27, 2009), a federal district court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision.

According to the login page, EDGE is “a web-based resource for the evaluation of foreign educational credentials” that is continually updated and revised by staff and members of AACRAO. Dale E. Gough, Director of International Education Services, “AACRAO EDGE Login,” <http://aacraoedge.aacrao.org/> (accessed September 12, 2011 and incorporated into the record of proceeding). In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), a federal district court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien’s three-year foreign “baccalaureate” and foreign “Master’s” degree were comparable to a U.S. bachelor’s degree. In *Sunshine Rehab Services, Inc.*, 2010 WL 3325442 (E.D.Mich. August 20, 2010), a federal district court upheld a USCIS conclusion that the alien’s three-year bachelor’s degree was not a foreign equivalent degree to a U.S. bachelor’s degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the alien employment certification itself required a degree and did not allow for the combination of education and experience.

In the section related to the Indian educational system, EDGE further provides that a Bachelor of Business Administration degree is two to three years in duration and represents attainment of a level of education comparable to two to three years of university study in the United States. In addition, EDGE states that a two-year master’s degree following a two to three-year bachelor’s degree is comparable to a U.S. baccalaureate.

On appeal, counsel asserts that the beneficiary possesses the equivalent to a U.S. bachelor’s degree followed by over five years of progressive experience in the specialty.

The AAO will next review the record to determine whether the petitioner has documented that the beneficiary has the necessary five years of post-baccalaureate experience. On the Form ETA 9089, the beneficiary listed approximately 10 months of employment as a management analyst for U.S. [REDACTED] from January 2002 to November 2002. The beneficiary also listed that he had been working as a management analyst for A+ Family Dental Care P.S. since November 2002. The petitioner also submitted two letters documenting the beneficiary’s relative experience, which the AAO finds to be persuasive evidence regarding the beneficiary’s prior post-baccalaureate progressive experience in the proffered position.

In this matter, the priority date is April 23, 2008, the DOL accepted the Form ETA 9089 for processing. *See* 8 C.F.R. § 204.5(d). As of that date, the AAO finds that the petitioner has demonstrated that the beneficiary possessed nearly six-and-a-half years of experience in the proffered position.

Because the beneficiary has a U.S. baccalaureate degree or foreign equivalent degree and five years of progressive experience in the specialty, he does qualify for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu*, 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien employment certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the alien employment certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in an alien employment certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v.*

Smith, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the alien employment certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the alien employment certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the alien employment certification.

In this matter, Part H, lines 4 and 7, of the alien employment certification reflect that a master's degree in business administration or a master's degree in a related field are the minimum level of education required. Lines 6 and 10 reflect that one year of experience in the proffered position or in the alternate occupation of management analyst is required. Line 8 reflects that a combination of education and experience is acceptable in the alternative. Specifically, a bachelor's degree and five years of experience are acceptable. Line 9 reflects that a foreign educational equivalent is acceptable.

The petitioner has demonstrated that the beneficiary possesses a foreign equivalent degree to a bachelor's degree in the United States by means of his three-year Bachelor of Business Administration from Gujarat University in India completed in 1999 and a two-year MBA from the same university completed in 2001. The petitioner has also demonstrated that the beneficiary possessed over five years of progressive, post-baccalaureate experience in the specialty before the priority date of April 23, 2008.

The beneficiary does not have a U.S. master's degree or a foreign equivalent degree. The beneficiary does, though, have a U.S. baccalaureate degree or a foreign equivalent degree followed by five years of progressive experience in the specialty. Thus, the beneficiary does qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does meet the job requirements on the alien employment certification.

While the petitioner has overcome the director's bases of denial, the petition is not approvable. First, the record contains inconsistencies regarding the petitioner's ownership and its status as a holding company. In a cover letter supporting a subsequent petition the petitioner filed in the beneficiary's behalf, the petitioner indicated that it is a parent company with "fourteen (14) dental offices, three dental lab management companies, one dental insurance management company, three bio-tech corporations, and five real estate development and management companies in Chalfont, PA." A separate three-page document on the petitioner's letterhead indicates it is the parent company of "seven corporations with fourteen (24) [*sic*] Dental Offices," including A+ Family Dental Care, P.C., and dental laboratories, bio-tech companies, information technology companies and real estate development companies. On the petitioner's 2007 Internal Revenue Service (IRS) Form 1120S U.S. Income Tax Return for an S Corporation, however, it indicated on Schedule B, line 3, that it did not own 50 percent or more of voting shares of any other company. On Schedule K-1, the 100 percent shareholder is identified as [REDACTED]

The petitioner operates its business at the same address as the previous petitioner for the beneficiary, A+ Family Dental Care P.C. Notably, A+ Family Dental Care P.C.'s 2004 IRS Form 1120S tax return, Schedule K-1, indicates that Niranjan Savani owned 100 percent of the business, rather than the petitioner or its owner.

The AAO has additionally reviewed other nonimmigrant petitions that the petitioner has filed with USCIS on behalf of other beneficiaries, [REDACTED] On Form I-129 Supplement L, the petitioner indicated that Arun Savani only owns 90% of its business. Yet the IRS Forms 1120S for 2008 and 2009 contained in these files, Schedules K-1, reflect that Arun Savani owns 100 percent of the petitioner. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The record does not resolve these inconsistencies regarding the ownership of its business within the record of proceeding.

Second, on the Form I-140 petitions in the record and the nonimmigrant petitions mentioned above, the petitioner has indicated it employs between five and eight employees. USCIS electronic records, however, reflect that the petitioner has filed at least 38 immigrant and nonimmigrant visa petitions. This number is not only inconsistent with the number of employees actually working for the petitioner, it calls into question the petitioner's ability to pay the beneficiary in addition to the other beneficiaries of the remaining petitions.

The AAO finds the inconsistencies in the record regarding the ownership of the petitioner's business and other affiliated companies to be significant. These inconsistencies call into question the viability of the job offer and whether the petitioner has the ability to pay the beneficiary the proffered wage of [REDACTED] from the priority date of April 23, 2008 onwards. The AAO notes that the director did not address these inconsistencies within his decision.

Therefore, this matter will be remanded. The director must issue a new denial notice, containing specific findings that will afford the petitioner the opportunity to present a meaningful appeal. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.